Paper No. 10

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER WOLPERT

Appeal No. 2002-1523
Application 09/524,811

ON BRIEF

Before ABRAMS, FRANKFORT, and STAAB, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 5, all of the claims pending in this application.

Appellant’s invention relates to a product dispensing and drainback fitting which is designed to be incorporated into

the neck of a container for storing and pouring liquids. While acknowledging that such fittings are generally known in the prior art (e.g., Fig. 1), appellant indicates on page 2 of the specification that the prior art fittings suffer from the problem known as "double pour." On page 5 of the specification, appellant notes that he has discovered that the length of the slot in the pouring spout of the fitting and the relative size of the drainback hole associated therewith are critical to preventing or minimizing double pouring. More particularly, appellant indicates that he has found that by shortening the length of the slot and decreasing the area of the drainback hole, double pouring is minimized. A copy of independent claim 1, representative of appellant's invention, can be found on page 5 of the brief (Paper No. 8).

The sole prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

Arnold et al. (Arnold) 5,855,299 Jan. 5, 1999

Claims 1 through 5 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Arnold. While the examiner

recognizes that the liquid dispensing fitting of Arnold does not discuss the design parameters of the spout (26), the slot therein (un-numbered), or the drain aperture (44), he concludes that

> [i]t would have been an obvious design choice to vary the sizes of the slot [designated by the examiner as N] and the drain back hole 44 according to the viscosity of the fluid. A higher viscosity would require a larger drain back hole 44 and slot N for a spill-free pour, while a lower viscosity would require a smaller drain back hole 44 and slot N. This type of obviousness is best explained in MPEP 2144.05, Part II: Optimization of Ranges (final rejection, page 2).

Rather than reiterate the examiner's full commentary concerning the above-noted rejection and the conflicting viewpoints advanced by appellant and the examiner regarding the rejection, we make reference to the final rejection (Paper No. 6, mailed April 4, 2001) and the examiner's answer (Paper No. 9, mailed November 19, 2001) for the examiner's reasoning in support of the rejection, and to appellant’s brief (Paper No. 8, filed August 27, 2001) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art reference, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination that the examiner's rejection will not be sustained. Our reasons follow.

Like appellant (brief, page 4), we note that Arnold is silent concerning any design parameters regarding the spout, slot, or drainback hole of the fitment therein, and thus provides no basis whatsoever for the examiner's conclusion that the particular parameters involved in appellant's invention are result-effective variables. Arnold focuses primarily on firmly securing the fitment (24) in the opening (16) of container (10) and providing multiple bands of sealing engagement therebetween to ensure creation of a leak-free fit. Arnold is not at all concerned about the architecture of the slot (un-numbered) or the drainback hole (44), or any interplay between the size of the

slot and the size of the drainback hole that might address the problem of "double pouring" confronted by appellant.

In responding to the examiner's reliance on In re Aller, 220 F.2d 454, 105 USPQ 233 (CCPA 1955), and the examiner's assertion that Arnold "disclose[s] the general conditions of the claim" (answer, page 4), appellant cites In re Antonie, 559 F.2d 618, 195 USPQ 6 (CCPA 1977) and notes that the parameters urged by the examiner to be optimized are not recognized in Arnold to be result effective variables, a condition precedent to any determination that the optimum or workable ranges of said variables may be arrived at through routine experimentation. Thus, appellant concludes (and we agree) that Arnold does not disclose the "general conditions" of the claims on appeal and that the examiner's position is entirely based upon hindsight reconstruction and improper obvious to try reasoning.

Lacking any credible teachings in the applied prior art itself which would appear to have fairly suggested the claimed subject matter as a whole to a person of ordinary skill in the

art, or any viable line of reasoning as to why such artisan would have otherwise found the claimed subject matter to have been obvious in light of the teachings of the applied Arnold patent, we must refuse to sustain the examiner's rejection of claims 1 through 5 under 35 U.S.C. § 103(a).

Accordingly, the decision of the examiner is reversed.

REVERSED

NEAL E. ABRAMS Administrative Patent Judge	)	
CHARLES E. FRANKFORT Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
LAWRENCE J. STAAB Administrative Patent Judge	)	

CEF:psb

Charles E. Cates
Cates & Holloway
P.O. Box 1532
Scottsdale, AZ 85252-1532